IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

AR.No. 12 of 2006()

APPLICANT

M/S. P.K.RAMACHANDRAN,
ENGINEERING CONTRACTORS, DEEPA MANDIR,
KARUVELIPADY, KOCHI-682 005, REP. BY THE
MANAGING PARTNER, P.K.RAMACHANDRAN

BY ADV. SRI.K.L.VARGHESE
SMT.SANTHA VARGHESE

RESPONDENT/ OPPOSITE PARTY

SREE NARAYANA TRUST MEDICAL MISSION,
P.B.NO.32, KOLLAM - 691 001, REP. BY ITS
CHAIRMAN.

BY ADV. SRI.BIJU HARIHARAN
SRI.NAIR AJAY KRISHNAN

THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON 06/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

PIUS C. KURIAKOSE,J.

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A.R. No. 12 of 2006

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Dated: 6th September, 2007

ORDER

This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is filed by the applicant who was the awardee of the contract for construction of a multi storied hospital building at Kollam for the respondent, contending that Clause 38 of the preliminary and general conditions of the contract between the parties is an arbitration clause and that the respondent in terms of that clause, is bound to arbitrate on the disputes between the parties, has not chosen to do so. Annexure-A1 is copy of the claim notice sent by the applicant to the respondent on 18.5.2005 requesting for settlement of the claims within 30 days and informing the respondent that on failure to do so, statutory arbitration procedure will be initiated. Annexure-A2 is copy of the reply which was sent by the respondent to the applicant. The applicant alleges that the Chairman of the respondent who was bound to function as arbitrator has acted only as one of the parties to the agreement and has even requested the applicant to desist from arbitration and other legal proceedings. It is contended that the tone and tenor of Annexure-A2 will show that the Chairman of the respondent has forfeited his right to function as

an arbitrator. Annexure-A3 is copy of a letter dated 6.10.2005 sent to the respondent incorporating two more claims and Annexure-A4 is an attested copy of the arbitration clause in the agreement which is produced as provided under clause (a) and Section 2 of the Scheme for appointment of arbitrator by the Chief Justice of the High Court of Kerala. The prayer in the arbitration request is that an independent and impartial arbitrator, preferably a qualified Civil Engineer, be appointed to settle all the claims of the applicant against the respondent.

2. A detailed counter affidavit has been filed by the respondent through its Chairman. It is contended therein that the application under Section 11(6) of the Act is not maintainable since the parties are not governed by an arbitration agreement as referred to in Section 7 of the Act. Clause 38 of the contract (Annexure-A4) does not constitute an arbitration clause at all. It is contended that the intention of the parties by incorporating the said clause was to avoid disputes rather than decide a formulated dispute in a quasi judicial manner. The said clause never contemplates an intention for arbitration. The counter affidavit goes on to give reasons as to why clause 38 cannot be construed as a clause for arbitration and

reiterates that the position of the Chairman under that clause can never be that of an arbitrator but can only be of a settler of disputes. As regards Annexure-A1 it is contended that the same is not a notice calling upon the respondent to enter on reference and act as arbitrator but is to be construed only as a request for payment of certain items. It is further contended that the words "final certificate" in Clause 38 can never be construed as an award and that at any rate Annexure-A2 reply ought to be treated by the applicant as an award and file a petition under Section 34 of the Act before the District Court, Kollam for setting aside the same rather than moving this Court under Section 11. The counter affidavit refers to Clause 39 of the special conditions of contract and submits that the intention of the parties was to settle the claims through a competent civil court having jurisdiction over Kollam.

3. To the counter affidavit a reply affidavit has been filed by the applicant reiterating their stand and referring to various judicial precedents and authorities.

4. Sri.K.L.Varghese, learned counsel for the applicant and Sri.Nair Ajay Krishnan, learned counsel for the respondent have addressed me extensively on the rival positions of their clients.

5. Mr.K.L.Varghese, learned counsel for the applicant would rely on various decisions in support of his arguments. Russell's Work on Arbitration (Russell on the Law of Arbitration-Twentieth Edition) was relied on to expatiate the distinction between certification and arbitration. Learned counsel placed strong reliance on the judgments of the Supreme Court in **Rukmanibai v. Collector, Jabalpur** (AIR 1981 S.C. 479), **Alimenta S.A. v. N.A.Co-op. Marketing Federation of India Ltd.** (AIR 1987 S.C. 643) to argue that where the parties aware of the arbitration clause of an earlier contract, the subject matter of which is different from the contract which is being entered into by them, incorporate the terms of the earlier contract by reference by using general words there would be no bar to such incorporation merely because the subject matters of the two contracts are different, unless, however, the incorporation of the arbitration clause will be insensible or unintelligible. Mr.Varghese relied on the judgments of the Supreme Court in **K.K.Modi v. K.N.Modi** (AIR 1998 S.C. 1297), **Vessel M.V.Baltic Confidence v. State Trading Corporation of India Ltd.** (AIR 2001 S.C. 3381), **Bihar State Mineral Development Corporation v. Encon Builders(I) (P) Ltd.** [(2003) 7 S.C.C. 418], **Mallikarjun v.**

Gulbarga University (AIR 2004 S.C. 716) and **State of Rajasthan v. M/s.Nav Bharat Construction Co.** (AIR 2005 S.C. 2795) in support of his various submissions.

6. Mr.Nair Ajay Krishnan, counsel for the respondent would resist all the submissions of Mr.K.L.Varghese. Learned counsel also did not lag behind in citing decisions. My attention was drawn by him to the judgment of the Supreme Court in **K.K.Modi v. K.N.Modi** (supra). He relied on the judgments of the Supreme Court in **Narayan Prasad Lohia v. Nikunj Kumar Lohia** [(2002) 3 S.C.C. 572) and **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.** [(2003) 5 S.C.C. 705]. He relied on Black's Law Dictionary for interpreting the word 'difference'.

7. I have considered the rival submissions addressed at the Bar in the light of the pleadings raised by the parties. I have also carefully gone through the decisions cited at the Bar. The essential question to be considered is whether Clause 38 of Annexure A4 projected by the applicant can be construed as an arbitration clause. Clause 38 will be quoted as follows:

"All disputes and difference of any kind whatever arising out of or in connection with the contract or the carrying out of the works

(whether during the progress of the work or after their completition and whether before or after the determination abandonment or breach of the contract) shall be settled by the Employer who shall state its decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Employer shall be final."

It is necessary to quote clause 39 and 40 also. Clause 39 is as follows:

"All disputes arising between the Contractor and the Employer on account of work will be referred to the Court of Law. The jurisdiction will be at Kollam only."

Clause 40 is as follows:

"The courts at Kollam alone shall have jurisdiction in respect of any matter arising out or in connection with the contract."

The contention of the respondent is that there is no arbitration clause in the agreement and clause 38 is to avoid dispute and not to arbitrate and the Chairman has been referred to in clause 38 more in the capacity of administrative head and his role is only to prevent disputes. But then, it will be noticed from **Rukmanibai's** case (supra) that the Supreme Court has upheld the validity of similar clauses as

arbitration clauses. It was held in that case that the clause reading "whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the matter in difference shall be decided by the lessor whose decision shall be final" is a valid arbitration clause. At the end of para 6 of the judgment their Lordships after noticing that in the clause under discussion there is a provision for referring the disputes to the lessor and that the decision of the lessor shall be final, found that on its true construction it spells out an arbitration agreement. The Supreme Court after referring to the judgment in **Rukumbai's** case and the judgment of the Calcutta High Court in **State of West Bengal v. Haripada Santra** (AIR 1990 Cal. 831) in which the agreement provided that "in the event of a dispute, the decision of the Superintending Engineer of the Circle shall be final" held in **K.K.Modi v. K.N.Modi** (supra) that such a decision could be arrived at by the Superintending Engineer only when the dispute was referred to him by either party for decision and he was also required to act judicially

and decide the disputes after hearing both parties and after considering the material before him and therefore it was an arbitration agreement. Moreover, the argument of the respondent that the role of the Chairman as per clause 38 is a preventor of disputes and not as an Arbitrator cannot be correct particularly since clause 38 comes under the title 'Settlement of Disputes' and covers 'disputes and differences of any kind whatever' arising out of or in connection with the contract or the carrying out of the works (whether during the progress of the work or after their completion and whether before or after the determination, abandonment or breach of the contract) etc. According to Russell (see para 2-002 and 2-009, page 26, 22nd edition) all disputes includes 'any difference'. It reads, "an arbitration agreement is therefore a contractual undertaking by two or more parties to resolve disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations. The term "disputes" includes "any difference"." Clauses 38, 39 and 40 of Annexure A4 will have to be seen as a whole package and cannot be read in isolation from each other. The expression 'settlement of disputes' is synonymous with arbitration. The argument of Mr.Varghese that the heading

'Arbitration' given to clause 39 may not be anything more than referring to the court which has got power to give effect to arbitration and that Clause 40 which deals with 'jurisdiction' can be understood only to limit the territorial jurisdiction of the courts having power on the matters in dispute has merit. The argument of Mr.Varghese that a harmonious construction has to be given at any rate to give effect to the agreement, if possible, has the support of authorities. Lord Brandon in (1978) 1 Lloyds' Report 545 reading, ".....if it is necessary as it obviously is, to "manipulate" or adapt part of the wording of that clause in order to give effect that intention, then I am clearly on the opinion that this should be done" (referred to in **Vessel M.V.Baltic Confidence v. State Trading Corporation of India Ltd.** (supra), para 13) are significant. Lord Denning also has taken a similar view that even though it might involve a degree of manipulation of the words it can be done in the context of finding out whether an arbitration clause in charter party was incorporated into the bill of lading [(1935) All E.R.Report 863].

8. The respondent has tried to cull out the expression 'final certificate' in clause 38 to make it appear that it may not be construed as an award. This is ignoring that it is held by all the courts

unanimously that there is no particular form of arbitration agreement and there is no particular form of an award. The Arbitration and Conciliation Act, 1996 which professes 'party autonomy' is more important. Section 31(3)(a) of the Arbitration Act will show that the parties have been conferred power to stipulate that reasons could not be given in the award. Therefore, there is nothing unusual if parties have stipulated that the decision of the arbitrator can be in the form of 'final certificate' which otherwise means that decision is final which is very much common in all arbitration clauses.

9. I am of the view that Annexure A4 thus contains an arbitration clause. In view of the conceded position that in spite of invocation of that clause by the applicant, the respondent has not been prepared to arbitrate on the issue facilitating settlement of the disputes, the applicant is justified in invoking the jurisdiction of the Chief Justice under Section 11 of the Arbitration and Conciliation Act. Accordingly, the A.R. will stand allowed. Mr.Justice J.M.James, a retired Judge of this court known for his learning and judicial integrity is appointed as Arbitrator to settle the disputes between the parties over the claims of the applicant which are highlighted in Annexures A1 and A3. Needless to mention that the Arbitrator will have the

authority to solicit the services of any qualified Civil Engineer to assist him. The Arbitrator will enter on reference at the earliest and pass his award without undue delay.

srd **PIUS C.KURIAKOSE, JUDGE**